

\* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

July 28, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing

Date of Filing: November 23, 2004

Case Number: TSO-0171

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter "the Individual") for continued access authorization. This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's suspended access authorization should be restored. For the reasons detailed below, I have concluded that it should be restored.

I. APPLICABLE REGULATIONS

The regulations governing an individual's eligibility for access authorization (also referred to as a security clearance) are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). "Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." *Id.* See generally *Dept. of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security" test indicates that "security-clearance determinations should err, if the must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9<sup>th</sup> Cir. 1990) (strong presumption against the issuance of a security clearance). Thus, the standard for eligibility for a clearance differs from the standard applicable to criminal proceedings in which the prosecutor has the burden of proof.

If a question arises concerning an individual's eligibility for a clearance, the matter is referred to administrative review. 10 C.F.R. § 710.9. The individual may (i) obtain a decision by the site manager based on the existing information or (ii) appear before a hearing officer. *Id.* § 710.21(3). Again, the burden is on the individual to present testimony or evidence to demonstrate eligibility for access authorization, i.e., that access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." *Id.* § 710.27(a).

## II. BACKGROUND

In March 2003, while holding a security clearance, the Individual voluntarily admitted himself into a psychiatric treatment program at a local hospital. DOE Ex. 1.6. Prior to the admission, the Individual had been diagnosed as having Dysthymic Disorder and was on medication for that disorder. As a result of his hospitalization, the Individual was diagnosed with Bipolar II Disorder and his medication was changed.

In May 2003, a DOE personnel security specialist interviewed the Individual. DOE Ex. 4.3. Based on the interview, the security specialist referred the Individual to a DOE consultant psychiatrist (the DOE Psychiatrist) for an evaluation. In November 2003, the DOE Psychiatrist evaluated the Individual and, in December 2003, issued a report. See DOE Ex. 2.8.

In his December 2003 report, the DOE Psychiatrist determined that the Individual had a mental disorder which may cause a significant defect in judgment and reliability. The DOE Psychiatrist identified the disorder as Bipolar II Disorder:

The [Individual] has Bipolar II Disorder; a condition characterized by symptoms of major depression with at least one hypomanic episode. In this particular class of manic depression or bipolar disorder, there is no mania or psychotic episode. In the case of [the Individual], he certainly manifested signs and symptoms consistent with pervasive depression, and there have been periods of hypomania or elevation in his mood. However, he did not experience any detachment from reality testing. There was no clear period of mania.

December 2003 Report at 8. The DOE Psychiatrist stated that the Individual had begun medication which had "stabilized his mood." *Id.* at 9. Nonetheless, the DOE Psychiatrist stated, the

Individual was still "symptomatic" and, therefore, his condition "has not fully stabilized." *Id.* Based on the foregoing, the DOE Psychiatrist concluded that the Individual's disorder was one which may cause a significant defect in judgment and reliability. *Id.*

In April 2004, a DOE office notified the Individual that his self-admission to the psychiatric treatment program and the DOE Psychiatrist's diagnosis constituted derogatory information that created a substantial doubt as to the Individual's continued eligibility for an access authorization. See Notification Letter (April 21, 2004), citing 10 C.F.R. § 710.8(h) (Criterion H). Upon receipt of the Notification Letter, the Individual requested a hearing. See Individual's Letter (May 11, 2004). A November 13, 2004 memorandum forwarded the request to the Office of Hearings and Appeals (OHA), and the Director appointed me to serve as the hearing officer.

In his letter requesting the hearing, the Individual did not dispute the matters giving rise to the Notification Letter, i.e. his self-admission to a psychiatric treatment program and the diagnosis of Bipolar II Disorder. See DOE Ex. 3-2. Instead, he maintained that he was successfully managing his condition with regular psychiatric visits and medication, i.e., that his condition was stabilized and would remain so. *Id.*

### III. THE EVIDENCE

#### A. Documents

The record contains reports of medical treatment and evaluation from 2002 to the present. See DOE Exs. 2.1 to 2.8; Individual Exs. B, F, M. In general, they reflect the diagnosis of, and treatment for, Dysthymic Disorder before March 2003, and the diagnosis of, and treatment for, Bipolar II Disorder beginning March 2003. The most significant documents are:

- (1) an April 2003 letter and a June 2003 report by a treating psychiatrist (the Psychiatrist), describing the Individual as "recovered," see Individual Ex. F and DOE Ex. 2.6;
- (2) the December 2003 report by the DOE Psychiatrist, describing the Individual as "not fully stabilized," see DOE Ex. 2.8 at 9;

(3) a December 2004 letter from a clinical psychologist who treated the Individual during May through July 2004, describing the Individual as "in full remission," see Individual Ex. B; and

(4) a March 2005 letter from a treating clinical psychologist (the Psychologist), describing the Individual as not having a condition or emotional state that would significantly impair his judgment or reliability, see Individual Ex. M at 5.

The record also includes a number of documents describing the Individual's work performance in positive terms. They include (i) performance appraisals, see Individual Ex. I, (ii) certificates of achievement and appreciation, see Individual Exs. C, D, E, and (iii) testimonials, see Individual Exs. A, N.

#### B. The Testimony at the Hearing

Seven individuals testified at the hearing. The DOE office presented one witness: the DOE Psychiatrist. He testified at the beginning of the hearing, listened to the testimony of the other witnesses, and then testified at the end of the hearing. The Individual offered his own testimony and that of five others: his wife, his former supervisor (the Supervisor), a co-worker who is also a friend (the Co-worker/Friend), the Psychologist, and the Psychiatrist. The testimony of the Individual and his witnesses are discussed first.

##### 1. The Individual

The Individual testified that he voluntarily admitted himself to a psychiatric treatment program because he "wanted to get perspective and [he] wanted to start with a baseline and talk to professionals in a neutral environment." Transcript ("Tr.") at 169. Prior to his hospitalization he "constantly felt a sense of hopelessness and powerlessness." *Id.* at 164. Following his hospitalization, he was more positive at work and in his relationships with his children and his wife. *Id.* at 165-67. The Individual attributed much of this positive change to a change in medication. Tr. at 167-71.

The Individual testified that he is optimistic and believes that his prognosis is good. *Id.* at 180. He continues to see a psychiatrist and psychologist and to take his medication. *Id.* at 192-93, 195. He does not believe he is in danger of

relapsing because he is "taking all steps necessary to keep check on everything that's going on about [him]." *Id.* at 197.

## 2. The Individual's Wife

The Individual's wife testified that she noticed a positive change in the Individual following his hospitalization. Prior to entering the psychiatric treatment program, the Individual was "despondent" and he is now much happier and more optimistic. *Tr.* at 124. The Individual takes his medication daily and is very serious about staying on track with it. *Id.* at 125. The Individual handles stress better and his mood has become more calm and consistent. *Id.* at 126, 129-30.

## 3. The Supervisor

The Supervisor testified that the Individual is an "excellent" and "very dedicated" employee, see *Tr.* at 84, and she discussed the Individual's most recent performance appraisal, *id.* at 91-93 (discussing Individual Ex. I). The Supervisor never noticed any signs of depression or mania that would lead her to believe that the Individual was incapable of doing his job. *Id.* at 95-96. Prior to the Individual's hospitalization, she did notice that he was becoming more stressed and "burning the candle at both ends." *Id.* at 97-98. Since the Individual's hospitalization, his pace is different: "he still works hard . . . but he's not frenetic." *Id.* at 99-100.

## 4. The Co-Worker/Friend

The Co-worker/Friend testified that the Individual is conscientious, hardworking, and trustworthy. *Tr.* at 109. Since the Individual's hospitalization, the Individual is more at peace with himself and less stressed. *Id.* at 110. Regarding the Individual's ability to manage stresses in his life, the Individual is more accepting of the normal stresses and strains of family life and has a healthy balance between his personal life and his work. *Id.* at 113, 114.

## 5. The Psychologist

The Psychologist treated the Individual in 1999 and 2000 for mild Dysthymic Disorder. Individual Ex. M. In January 2005, the Individual again sought treatment from the Psychologist, who prepared the March 2005 letter describing the Individual's current status. See *id.* The Psychologist testified that the Individual suffers from dysthymic and adjustment disorders,

rather than Bipolar II Disorder, and that the Individual does not suffer from a defect in judgment or reliability. Tr. at 142, 146. The Individual does not suffer from "poor reality testing" or "lack of emotional control" that would lead to impaired judgment or lack of reliability. *Id.* at 147. Instead, the Individual "sets high standards for himself" and is "basically a conscientious, careful individual." *Id.* at 147.

The Psychologist testified that the Individual's risk of relapse is "very low." The Psychologist testified:

[G]iven his present treatment and given his personality and his commitment to his treatment and the progress he's made to date, I would say his chances of relapse are very low.

*Id.* at 156. The Psychologist assessed the chances of relapse as "[n]o higher than they would be for an average person or an average employee." *Id.*

#### 6. The Psychiatrist

The Psychiatrist treated the Individual in 2003. He testified concerning his 2003 evaluation. Tr. at 74-78 (discussing DOE Ex. 2.6). The Psychiatrist cited his evaluation that the Individual was "recovered" from "mild" Bipolar II Disorder, did "not" have a significant defect in judgment and reliability, and had an "excellent" prognosis. *Id.* at 76.

The Psychiatrist also testified concerning the meaning of "full remission," the term used in a treating psychologist's December 2004 report, see Individual Ex. B. The Psychiatrist testified:

"In remission" means that the criteria for the diagnosis and for the illness in an active state is no longer present; that the symptoms, signs and manifestations are no longer present; and it also implies that there has been an increase in the GAF score [level of functioning].

Tr. at 56-57. The Psychiatrist testified that in lay terms "full remission" meant that the person was "cured" or "stabilized." *Id.* at 58. As for the risk of relapse, the Psychiatrist testified that although the general rate of relapse was 15 percent, the Individual's commitment and other factors put him in the "lower part" of that 15 percent. *Id.* at 60.

## 7. The DOE Psychiatrist

As stated above, the DOE Psychiatrist testified at the beginning of the hearing concerning his assessment of the Individual's progress in late 2003. At that time, the Individual was "improving" but was not "stabilized to the point that he would have been able to have functioned without jeopardizing his security clearance." Tr. at 20. When asked what was necessary to show stabilization, the DOE Psychiatrist stated that the ideal was the lack of symptoms or, if symptoms were present, that they be very minimal. Id. at 33. The DOE Psychiatrist stated that he looked for an individual to show a one to one and one-half year period of stability, i.e., where an individual had not worsened or shown additional symptoms. Id. The DOE Psychiatrist testified that that period of stability improves an individual's prognosis. Id. at 33-35.

During his initial testimony, the DOE Psychiatrist was asked to comment on the December 2004 report of one of the treating clinical psychologists. Specifically, the DOE Psychiatrist was asked to comment on the conclusion that the Individual was in "full remission." The DOE Psychiatrist testified that he believed the report was "accurate." Tr. at 45. The DOE Psychiatrist also testified that the Psychologist, who was currently treating the Individual, had relevant and timely information because the Psychologist had seen the Individual recently and over an extended period of time. Id. at 47.

After listening to the other six witnesses testify, the DOE Psychiatrist updated his assessment to the effect that the Individual was fully stabilized. The DOE Psychiatrist testified that the Individual had responded well to his medication and made "excellent" progress. Id. at 211. The DOE Psychiatrist testified:

[The Individual is] much calmer, his demeanor is so different, he's much more organized and logical in the way he presents his thoughts, and I think that's a very good indication of his stability.

Id. Finally, the DOE Psychiatrist testified that he "had no reason to believe that there is still a defect in judgment and reliability." Id.

#### IV. ANALYSIS

It is undisputed that in 2003 the Individual was diagnosed with Bipolar II Disorder and that this diagnosis raises a security concern. See 10 C.F.R. 710.8(h) (mental condition or disorder that may cause a defect in judgment or reliability). Once derogatory information has been received, the burden shifts to the individual to prove that "the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(a). The ultimate decision concerning eligibility is a comprehensive, common sense judgment, based on a consideration of all relevant information, favorable and unfavorable. *Id.* § 710.7(a).

The Individual has met his burden of resolving the Criterion H concern. Specifically, the Individual has brought forth sufficient testimony and evidence to establish that he is fully stabilized and, therefore, does not have a defect in judgment and reliability.

The Individual brought forth testimony and evidence concerning his progress since the DOE Psychiatrist's December 2003 report. The Individual, his wife, the Supervisor, and the Co-worker/Friend all testified concerning the positive change in the Individual, including his mood and ability to handle stress. See, e.g., Tr. at 165-71 (the Individual); 124-26, 129-30 (the Individual's wife); 99-100 (the Supervisor); 110, 113, 114 (the Co-worker/Friend). The Psychiatrist testified that the Individual was "recovered" in 2003. *Id.* at 76. The December 2004 letter from a treating psychiatrist states that the Individual was in full remission in the summer of 2004. Individual Ex. B. The Psychologist, who is currently treating the Individual, testified that the Individual has no defect in judgment and reliability. Tr. at 142, 146.

The testimony and evidence brought forward by the Individual has resulted in an updated, favorable assessment by the DOE Psychiatrist. At the beginning of the hearing, the DOE Psychiatrist testified that he looked for a period of one to one and one-half years of stability and that an extended period of stability improved an individual's prognosis. Tr. at 33-34. After listening to the testimony of all the witnesses, the DOE Psychiatrist noted the Individual's stability and concluded that he saw "no reason" to believe that there was a defect in judgment or reliability. *Id.* at 211.



Moreover, the medical professionals agree that the period of stability renders the risk of relapse low. The Psychiatrist testified that the Individual's profile, including personal commitment and family support, puts him in the lower part of general 15 percent relapse rate. Tr. at 60. The DOE Psychiatrist testified that a one to one and one-half year period of stability, which he had not seen at the time of the December 2003 report, improved the prognosis from the general relapse rate. Id. at 33-35.

Based on the testimony and evidence, I find that the Individual is stabilized and has a low probability of relapse. The Individual's witnesses were familiar with the Individual and testified openly and candidly. The DOE Psychiatrist clearly explained the basis for his evaluation in his December 2003 report and the basis for his updated assessment. In sum, all of the testimony at the hearing, including the testimony of the DOE Psychiatrist, convinces me that the Individual has successfully mitigated the Criterion H concern raised by the diagnosis of Bipolar II Disorder.

#### V. CONCLUSION

The Individual has resolved the Criterion H concern set forth in the Notification Letter. Therefore, restoring the Individual's access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, the Individual's access authorization should be restored.

Janet N. Freimuth  
Hearing Officer  
Office of Hearings and Appeals

Date: July 28, 2005